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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 76.

JAMES GALLICK,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS, CUYAHOGA COUNTY, OHIO,
EIGHTH JUDICIAL DISTRICT OF OHIO.

BRIEF OF RESPONDENT.

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BRIEF OF RESPONDENT.

QUESTIONS PRESENTED FOR REVIEW.

Contrary to petitioner's statement (PB 5-7*), there are in reality only three principal questions presented for review in this case, any one of which, if answered in the negative, will require affirmance of the judgment for respondent entered by the Ohio Court of Appeals. They are:

(1) Was there sufficient record evidence of railroad negligence to require submission of petitioner's FELA action to the jury?

---

* For convenience, the following abbreviations will be used throughout this brief:

Petitioner's Brief on the Merits	PB ___
Printed Record	R ___
Plaintiff's Exhibits	PX ___
Defendant's Exhibits	DX ___

(2) Assuming Question 1 is answered affirmatively, was there sufficient record evidence to take to the jury the question whether petitioner's illness resulted in whole or in part from such railroad negligence?

(3) Assuming Questions 1 and 2 are both answered affirmatively, were the findings of the jury in its special verdict legally sufficient to support a judgment for petitioner?

If all of these questions are resolved by this Court in petitioner's favor, then the following procedural question will also be presented:

(4) Should the case be remanded for consideration of the many grounds of error asserted by respondent but not passed upon by the Ohio Supreme Court, including, among others, errors with respect to the admission of evidence, interpretation of Ohio procedural statutes, and the excessiveness of the verdict?

STATEMENT.

1. Introductory. Petitioner's Statement of the Case is wholly inadequate to delineate the factual context giving rise to the above questions. It is necessary, therefore, to supplement and correct petitioner's statement in three important respects: (1) The statement which follows will correct the numerous errors, exaggerations, and misstatements favoring petitioner which are found in his brief; (2) it will provide the court with a "concise statement of the case containing *all* * that is material to the questions presented," as required by Rule 40(1)(e), thus correct-

* Unless otherwise noted, emphasis is added to all quotations appearing in this brief.

ing petitioner's numerous omissions; and (3) it will point out the numerous and crucial factual issues the establishment of which was indispensable to petitioner's case but upon which the record is wholly silent.

The statement will contain only such facts as are established either by the uncontradicted evidence or by resolving all conflicts in petitioner's favor, as this Court is required to do.

2. The Issues Framed by the Pleadings. Although the amended petition filed in the trial court set forth six specifications of railroad negligence (R. 2-3), only two of these were submitted for the consideration of the jury (R. 540), and it is not understood that petitioner challenges the action of the trial court in so limiting the issues for determination. The two specifications submitted alleged that respondent was negligent:

> "4. In that it failed to provide plaintiff with a reasonably safe place to perform his work duties.
>
> "6. In that it knew that by permitting said pool of stagnant water to accumulate dead pigeons, rats, bugs and vermin, insects would be attracted to said area, and that its employees would have to work under unhealthful and unsanitary conditions." (R. 540.)

Since no evidence was offered tending to prove that petitioner's place of work was unsafe other than by reason of the alleged property conditions, it is clear that the gist of petitioner's cause of action presented but a single claim of negligence: that respondent "knew" that by permitting unsanitary conditions to exist on its premises it would attract insects harmful to man, thereby creating an unreasonable risk of harm to its employees, including petitioner, and that "as a direct and proximate result thereof, he was caused to be bitten by an insect, causing his illness." (Amended Petition, R. 3.)

The following is the record evidence adduced by petitioner in support of this claim.

3. The Petitioner. Petitioner was 58 years old at the time of trial (1959) and had resided in Cleveland, Ohio, or its suburbs for about 27 years. Prior to 1944, petitioner had worked as a laborer in the construction industry, and from then until the onset of his illness in 1954 he was employed by respondent as a trainman in and about its Cleveland yards. Until then, his medical history had been unexceptional, and he was in good health, so far as he knew, until August of 1954, when the events transpired which gave rise to this action. (R. 52-55.)

4. The Flats Area of Cleveland. For substantially 10 years prior to his alleged insect bite, petitioner's job as a freight train crew man took him daily from one end to the other of what is commonly known as the "Flats" area of downtown Cleveland. Because the single and only ground of liability herein asserted is that respondent knowingly permitted conditions to exist at one place on its right of way which attracted insects harmful to man, thereby allegedly causing petitioner's illness, it is essential that the overall nature and characteristics of the Flats area which surrounded its right of way be thoroughly understood.

The City of Cleveland, a highly industrialized metropolitan area with a population of approximately 1,465,000 people,* is located on the south shore of Lake Erie and extends for many miles to the east, west, and south of the mouth of Cuyahoga River, which is a principal artery of its industrial life. The Cuyahoga is a meandering river which makes its way north to the lake through a flat valley of varying width which is contained on the east and west

* 1950 U. S. census.

by comparatively steep bluffs or valley walls. It is the valley floor, containing a large part of Cleveland's heavy industry, that is known as the Flats. In it are located numerous railroad rights of way including respondent's, three or four large steel mills, an oil refinery, meat packing plants, a garbage disposal plant, junk yards, and other commercial and industrial enterprises too numerous to mention. The river itself, which for at least five miles of its length south from the lake can accommodate large lake freighters and ore boats, served in 1954 and for many years prior thereto as the sole means of removal to the lake of large quantities of raw untreated sewage from substantially the entire watershed of the river. (R. 386-7.) Within a few hundred yards of the place where petitioner claims to have sustained his insect bite, additional raw sewage was dumped into the Cuyahoga River from a group of the city's largest office buildings which overlook the valley. Even closer at hand was a garbage dump at which rats and pigeons were accustomed to feed. (R. 383 *et seq.*, 345-346.)

The place at which petitioner was bitten is within 75 yards of the sewage-laden Cuyahoga River. The numerous maps and photographic exhibits introduced by respondent descriptive of the Flats area (DX J, R. 476; K, R. 615; L; M; N, R. 617) will assist the court in obtaining a general overall impression of its characteristics. They cannot, however, convey the same first-hand sense of its overall unwholesomeness which was possessed by the jurors and courts below, all of whom were personally familiar with the area by virtue of personal experience. In short, as the heart of industrial Cleveland, the Flats are neither clean, sanitary, nor beautiful. It was, however, the place where many thousands of people earn their daily bread, and where petitioner claims that respondent's lack of sanita-

tion resulted in an "injury" to him for which respondent is liable.

5. The Nature of Petitioner's Work. Prior to the date of his alleged insect bite, petitioner had worked regularly either as a freight train brakeman or as a conductor (depending upon whether he had the most seniority in the crew on any given date) on a locomotive and crew known collectively on the railroad as the "downtown" or "Seneca Street" job. The work of the downtown job followed a consistent routine. The crew, composed of an engineer, fireman, conductor, and two or three brakemen, was required to report for work at 3:00 p.m. each day at the "Seneca Street yard office," located in the basement of a building owned by respondent and originally used years ago as a passenger station. The old passenger station, so-called, is situated on Columbus Road, which is the main north-south artery on the east bank of the Cuyahoga, and the building is within 100 yards or so of the river itself. It is also less than a quarter of a mile away from Cleveland's Public Square, which is the hub of downtown Cleveland's business and retail traffic.

From the Seneca Street yard office the crew members would proceed to their engine located on the so-called "river track", which is the B&O main track in the city of Cleveland and runs in a generally north-south direction between and roughly parallel to Columbus Road and the Cuyahoga River. From then on until quitting time at 11:00 p. m., the crew's work took them *thoughout the Flats*, from respondent's main classification yard (the "Clark Avenue Yard") on the south, to the Pennsylvania-B&O interchange track on Whisky Island at the shore of Lake Erie on the north. As shown by the aerial photographs in evidence (DX M, R. 476), the overall trackage

traveled by petitioner in the course of his normal working day was approximately five miles in length, and he normally passed over it as least once in each direction. (R. 83-4)

Petitioner's work as a member of the crew consisted of spotting and picking up freight cars on industry sidetracks along this route, transferring them to the Clark Avenue Yard on the south or to the Pennsylvania Railroad interchange on the north, and moving and classifying cars in and about respondent's own facilities at various intermediate points, including a large B&O freight house and adjacent spur tracks which were within two or three hundred yards of the Seneca Street yard office. (R. 56-59, 83-84.) In the course of his work on the downtown job, petitioner customarily walked or rode a train under a highway bridge called the "Columbus Road bridge" (the scene of the alleged injury) approximately twice a day, and he had been doing this every working day for approximately four years, and irregularly for six years before that, prior to the date of the occurrence herein involved. (R. 93-94.)

6. **Petitioner's Movements on the Day of the Alleged Bite.** On a day in early August, 1954 (about the tenth, the exact date being unknown), petitioner reported for work at the Seneca Street yard office at a time variously described by him to be either an hour (R. 58) or a half hour (R. 85-87) prior to going on duty at 3:00 p. m. He was attired in summer working clothes, including khaki trousers which came down to the tops of his high work shoes, and elastic-topped cotton socks which extended up his legs about 12 inches from the ground. (R. 84-85.) Since on this particular occasion his seniority entitled him to act as conductor in charge of the crew, he spent about 15

minutes or so telephoning the Clark Avenue Yard for instructions as to what switching movements were to be accomplished during his shift. The balance of the hour or half hour prior to going on duty was spent "loafing". (R. 87.)

At three o'clock petitioner and the rest of his crew (none of whom was called as a witness, and only one of whom he could name—R. 62) proceeded to their diesel locomotive on the river track to commence work. After leaving his lunch pail on the diesel, petitioner proceeded on foot to supervise some switching which was to be done in the "spur yard" located west of the Seneca Street yard office, south of Columbus Road, and *immediately adjacent to the Cuyahoga River,* which at this particular point in its meandering northward course runs approximately east to west. (R. 62, 87, 617, 478-9.) The spur yard switching adjacent to the river took about 15 to 20 minutes. When this work had been done, the crew was to take the diesel north on the river track to do some further switching at the West Street team track, a facility just north of Columbus Road. To this end, the diesel backed east out of the spur yard to clear a switch joining it to the river track, while petitioner walked out of the spur yard towards the Columbus Road bridge. (R. 63, 87-88.)

7. **The Columbus Road Bridge.** The Columbus Road bridge, towards which petitioner walked, is a public bridge maintained by the public authorities which carries two lanes of automobile and pedestrian traffic on Columbus Road over the B&O right of way. Respondent's property at this point is approximately 25 feet wide and is occupied by the river track, a single set of rails, which pass under the bridge. The bridge has been in existence in substantially its present form since at least 1921. It is about 25 long and its clearance above the track is such that the

larger railroad boxcars pass beneath it with a scant 3-inch clearance. Approaching the bridge, the river track curves towards the right and north, so as to pass beneath it in a roughly north-south direction, while the public street overhead runs approximately east and west. (R. 287, 284.)

8. The Alleged Insect Bite. When petitioner reached a point directly under the Columbus Road bridge, he felt something which he described in his trial testimony as an insect bite. No one witnessed this incident or was able to confirm any part of petitioner's story of how or where it happened, or even that it happened at all. Since his claim is thus supported solely by his own testimony, it is important that it be carefully reviewed.

Though there were some material discrepancies between petitioner's deposition and trial testimony (*e.g.*, R. 90), his story at the trial was that he walked towards the Columbus Road bridge from the spur yard next to the river, crossing as he did so Lime Road, a narrow unpaved public street which runs between the spur yard and the river track. As he approached the bridge underpass, he followed a raised cinder path just *west* of and immediately adjacent to the river track. (R. 65.) When he reached a point directly beneath the bridge, he stopped in the middle of the path, turned completely around, and stood facing south for about 30 to 45 seconds to see where the diesel was. (R. 65.) *There was no evidence that he felt any movement on his person as he stood there.* Then, when he saw that the diesel had cleared the switch and was following him up the track, he turned back towards the north, took one or two steps in that direction, and then felt what he described as a "bite" on the back of his left leg about 4 inches above the knee. Reaching down he grasped an object *inside* his khaki pant leg between the thumb and first three fingers of his left hand. He did not

then or later see what it was, and *the only evidence from which its nature can be deduced is his description of what it felt like when he grasped it.* According to his testimony, it was about one-half inch in diameter (as big around as his little finger) and two inches long (equal in length to the full breadth of the first three fingers of his hand). (R. 92.) He squeezed it and heard it "crack" or "pop." He then let go of it as he continued to walk northward along the track, and he felt it roll down his pant leg to the top of his shoes, from which it presumably fell out onto the ground. (R. 65-66.)

He testified:

"Q. How do you know you were bitten? A. Well, I know I was bit because I slapped my pants leg and crushed it.

Q. What do you think you crushed? A. Well, it was something, some insect.

Q. Did you see it? A. No, I didn't.

Q. Have you ever seen it? A. No, I haven't." (R. 66.)

"Q. It is a fact, isn't it, that you never saw anything under the Columbus Road bridge, before the insect bite, that looked anything like the one that you felt when you snapped at your pant leg, isn't that so? A. I don't know because I don't know what it was that I felt." (R. 157.)

9. Conditions In and Around the Columbus Road Bridge. Petitioner's basic and sole claim of liability in this case is that the insect which supposedly bit him was attracted by and transmitted to his person some unknown form of illness or disease, from the allegedly unhealthful and unsanitary conditions which respondent negligently permitted to exist under the Columbus Road bridge. (Specifications Nos. 4 and 6 of the Amended Petition were

the only ones submitted to the jury; R. 540.) The evidence descriptive of these conditions was as follows:

All of the witnesses were in accord that for many years prior to August, 1954, there had existed a small standing pool of drainage rain water beneath the Columbus Road bridge, which lay roughly parallel to the river track but located *east* of it, or on the side *opposite* that on which plaintiff stood just prior to his bite. The pool was sometimes larger and sometimes smaller, depending on the amount of rainfall, but in the shade of the bridge it never dried up completely even in dry summer weather like that which preceded the alleged insect bite. In general size and appearance, it was undisputed that the pool was more or less the same in August, 1954, as when the various photographs introduced by plaintiff were taken. It was also undisputed that the bodies of some dead pigeons had been seen in this water from time to time prior to August, 1954. (R. 23-33.) As to the number of dead pigeons, the presence of dead rats, and the number of insects, there was, however, a substantial disagreement (*e.g.*, R. 315-316, 340), and it was uncontradicted that passers-by on the overhead street would frequently throw rubbish and garbage onto the track below. (R. 298-90, 314-5.)

Petitioner's evidence on these questions came largely from his own lips. He testified that the stagnant pool was at least the width of the river track (i.e., not less than ten feet) *removed* from the point where he was bitten; that the area in the vicinity of the pool on the east side of the track was always "filthy" and was never cleaned up; that in this area were continuously to be found carcasses of dead pigeons and dead rats; that there were usually as many as 20 to 30 dead pigeons and 10 dead rats in the area, most of which were under the bridge itself (R. 96-97, 154-

5); and that there were also to be found in the same area "many" different kinds of insects, both crawling and winged, none of which, however, (except for flies, mosquitoes, and Canadian Soldiers*) was petitioner able to name, describe, or otherwise identify. At his deposition two years prior to trial petitioner had testified without qualification that he had never seen an insect that looked to be the same size and shape as this one felt, but he repudiated this testimony at the time of trial and said that prior to August, 1954, he *had* seen insects crawling on the bodies of dead pigeons which were of the approximate size of the object he felt, *but he could not otherwise describe or identify them as to species, type, or appearance.* (R. 59-60, 156-9.)

Petitioner's testimony on these subjects was supplemented in fragmentary fashion by the evidence of three other B&O employees who were called for cross-examination in petitioner's case under color of a recently-enacted Ohio procedural statute (Ohio Revised Code § 2317.152). While they confirmed in a general way petitioner's description of the property conditions in and about the Columbus Road bridge (R. 23-33), none of them was willing to paint the same picture as did petitioner himself, and in no respect was the testimony of any of them more favorable to petitioner's case than was his own.

Petitioner produced only one other witness to testify on the factual aspects of the issue of liability. He was Cyril W. Neff, a civil engineer employed as an expert to survey and testify concerning drainage conditions under the Columbus Road bridge in 1959, a few days be-

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* Canadian Soldiers, as every resident of Cleveland knows, are a harmless seasonal species of flying, non-biting insects which occasionally swarm in off of Lake Erie in large numbers in the early spring and then die in a few days.

fore trial. (R. 198 *et seq.*) The apparent purpose of his testimony was to establish that a simple and inexpensive means was available to respondent to eliminate the standing water under the bridge, thus substantially reducing the supposed health hazards to employees of respondent.

Neff stated on direct examination that the pool could be eliminated merely by filling and raising the area occupied by the standing water with approximately six inches of slag. (R. 127-8.) However, on cross-examination of Neff it was established that even in the absence of any such slag fill, the water level of the pool comes to within one-eighth of an inch of the bottom of the ties supporting the track, and that if the grade of the area were raised by six inches of fill, the ties would be immersed in water to the extent of almost three-quarters of their 8-inch height. (R. 137; 143; 144-5; PX 12, R. 122, 131, 571.) Later uncontradicted testimony disclosed that such filling would have caused "pumping" or vertical movement of the ties and track during the passage of trains and thus created a risk of derailment. It was also established through the same witness that the track itself could not be raised above its present level because the vertical clearance between the tracks and the public bridge above for some of the taller boxcars currently in use on the nation's railroads is already barely adequate, and that the various levels of the system of drain sewers leading away from respondent's property were such that no other effective corrective measures were available to respondent. (R. 284-9; 345.) No other solution was suggested.

10. Respondent's Notice of the Alleged Unsanitary Conditions. Apart from such notice as may be implied by the presumed long-term existence of conditions beneath the Columbus Road bridge, the only evidence tending in any way to prove any prior complaint was petitioner's

own unconfirmed testimony that on one or perhaps two occasions of unknown date, he had asked Paul Delaria, respondent's track foreman, if he would not do something about cleaning up the dead rats and pigeons. (R. 60, 159-62.) Despite elaborate grievance procedures, the very purpose of which was the correction of unsafe or unsanitary working conditions (R. 341-3), petitioner knew of no other similar complaints ever having been made by other employees (R. 162), and it was affirmatively established through the union "griever" that none had been made. (R. 341-5.) There was no testimony of complaints made by *anyone* of an insect bite or of the existence of *any* insects at the bridge, either in unusual numbers or of dangerous kinds.

11. Petitioner's Illness. During the first three or four weeks following the alleged insect bite, it grew in size from a small pimple to the size of a half dollar. Petitioner first sought medical advice on August 26, about two weeks after the "bite," when he consulted Dr. Heller, his family doctor. Dr. Heller's treatment proved ineffective, and about three weeks later, he sought the advice of Dr. Ippolito, who admitted him to Marymount Hospital on September 18, 1954. By this time a large skin ulcer had developed on his left leg, but others shortly followed on far removed parts of his body *where there was no claim of any bite*, such as under the left arm and on the right leg. (R. 580.) The course of these and subsequent skin ulcers has required petitioner to remain a hospital patient almost continuously from that day to this, first at Marymount, later at the Cleveland Clinic, and ultimately at Highland View County Hospital in the Cleveland suburbs. During this time the sores on his legs grew so large and deep that eventually surgical amputation of both legs became necessary. At the time of trial, according to the uncontradicted

medical testimony, petitioner's life expectancy has been reduced to a probability of about four or five years. (R. 429-30.)

12. Petitioner's Medical Testimony. The unanimous medical testimony in this case makes clear that medical science is utterly baffled as to the underlying cause of petitioner's unfortunate illness. The medical testimony consisted of the evidence of four different doctors, three of whom, Drs. Heller, Ippolito, and Anderson, were physicians who had had charge of petitioner's case at various times during the course of his illness. The fourth was Dr. Davis, who had examined him several times on respondent's behalf for the purpose of testifying. Except for the hypothetical opinion of causation, there was no material conflict in the testimony of the doctors. Thus, while each of them described petitioner's ulcerated skin condition as "pyoderma gangrenosa," all agreed that this term was nothing more than descriptive of his symptoms. Dr. Anderson, who cared for plaintiff for about two years during his hospitalization at Cleveland Clinic put it as follows:

> "Q. Will you tell us the meaning of the medical term 'pyoderma gangrenosa'? A. Yes, sir, it is a descriptive term and only a descriptive term.
>
> Q. By that you mean what? A. It describes three things. Pyo means 'pus'; derma means 'skin'; and gangrenosa means 'necrosis.'
>
> Q. In other words, it describes the appearance of the skin condition, is that the idea? A. Yes. * * *
>
> Q. But the term 'pyoderma gangrenosa' does not include a description or reference to any cause? A. No, it does not." (R. 249-50.)

All doctors agreed that the term implies nothing whatever as to the underlying *medical* cause of the condition.

The doctors were also in complete agreement on two fundamental propositions which lie at the very heart of this case:

First, there was nothing about the appearance or nature of the petitioner's ulcer which was medically recognizable as traceable to or characteristic of any form of insect bite; and

Second, that after all the numerous diagnostic tests known to science, the underlying medical cause of petitioner's illness remains completely unknown.

Illustrative of the first point is the testimony of Dr. Heller, to whom petitioner first went for advice about two weeks after the bite. Dr. Heller testified that the lesion had the appearance of an ordinary staphylococcic infection —"a typical boil" (R. 109, 111); that there was nothing about its appearance to suggest that it had been caused by an insect bite, nor did petitioner give him such a history. (R. 107-8, 116.) On the contrary, Heller testified that lesions such as he saw are common happenings; they are caused by staphylococcic bacteria which are found literally everywhere: on a clean person's skin, under fingernails, in the air, and on everything we touch; that such bacteria can enter the body through any microscopic break in the skin, even through a hair follicle; and that the only unusual thing about the petitioner was that in his case, the condition did not respond to sulpha drugs and penicillin, which are usually found to be effective cures. (R. 110-6.)

The testimony of Dr. Ippolito, who treated petitioner during his first hospitalization at Marymount, was to the same effect:

> "Q. In other words, except for what he told you, that place on the back of his leg looked like any other open sore that you might see on another patient? A. Not any open sore. It was tremendous.

Q. Well, except as to size? A. Yes.

Q. But as far as the other appearance was concerned, it looked like an open sore from any cause? A. Yes, sir.

Q. And I might get an open sore if I fall down and skin my knee and knock some of the skin away, and don't take very good care of it and it starts to get a little pussy, would that be an open sore? A. Yes, sir." (R. 225.)

Dr. Anderson testified to the same effect. (R. 252.) Both doctors stated that any hospital record entry or opinion that the first ulcer was "secondary to insect bite" was based entirely upon petitioner's statement to that effect, and not upon any medical determination. (R. 199, 212-3, 219, 225, 252.)

On the second point, both the hospital records and the doctors' testimony reflect in dozens of places that all attempts were unsuccessful to reach any sort of firm diagnosis as to the basic cause of petitioner's illness. Thus, while pyoderma gangrenosa is frequently symptomatic of certain recognized underlying systemic disease (i.e., non-infectious and originating within the patient's own body—R. 253-4), such as ulcerative colitis, empyema, and diabetes, among others (R. 204, 205, 207-10, 216, 227, 229, 251, 252-4, 255-6), none of these was ever found to be present in his case. Cancer was also at one time suspected. (R. 211.) Various types of common surface organisms—viral and bacterial—were cultured from the ulcers at different times, but no one of them remained constant or was ever considered to be the cause. (R. 217-8, 272-3.) Nor was it ever determined why similar ulcers also appeared at other parts of petitioner's body where there was no history of insect bite, for no infection was found in his blood stream. (R. 212-3, 258-9.) Equally mysterious was why the ulcers—as distinguished from the common surface and

air contaminants they contained—proved to be resistant to all the antibiotics usually found to be effective in curing infections. (R. 110, 112, 253.) Dr. Ippolito's conclusion, as expressed in the Marymount Hospital Record (PX 12), was:

> "The patient * * * has had a lengthy hospitalization here as a result of multiple ulcerations of the skin due to pyoderma gangrenosa, *specific etiology unknown.*" (R. 182.)

He defined the word "etiology" as follows:

> "Etiology means the specific cause of a condition." (R. 216.)

The Cleveland Clinic Hospital Records (PX 15, 16, 17) abound with similar notations. The following entries are illustrative:

Jan. 8, 1957.	"No etiology found so far." (R. 257.)
March 1, 1957.	"Etiology never identified." (R. 257.)
April 13, 1957.	"Unknown etiology." (R. 257.)
April 25, 1957.	"Ulcers of legs—unknown origin." (R. 258.)
April 30, 1957.	"Main trouble not yet diagnosed as to etiology." (R. 258.)
June 27, 1957.	"Ulcers of right leg of unknown origin present for two and a half years." (R. 258.)

Dr. Robin Anderson, head of the Cleveland Clinic Department of Plastic Surgery, was questioned at length on this subject and testified as follows:

> "Q. Doctor, at the time of Mr. Gallick's final release from the hospital [Cleveland Clinic], which I think you told us was perhaps last July [1958], at the time he was taken from your hospital out to Highland View, was there a diagnosis entered?

A. This same diagnosis.

Q. What was that?

A. *Chronic ulceration.*

Q. Chronic ulceration.

A. Yes.

Q. *Once again, just a descriptive term?*

A. *Yes.*"

* * * * *

"Q. It does not relate to the cause, the basic cause?

A. It doesn't relate to the bacterial cause or the viral cause, no.

Q. Or some other cause if another cause exists?

A. Of the immediate cause. In terms of organism, no.

Q. *Now, all the time that he was there at the Cleveland Clinic, Doctor, did you ever determine the basic cause of Mr. Gallick's condition?*

A. You mean in terms of this organism that we are talking about?

Q. Well, do you know that we are talking about an organism, or is that theoretical?

A. *For the moment it is theoretical. I don't know what the immediate cause was.*

Q. All right. In other words, after two years at the Cleveland Clinic the folks out there still did not determine the immediate cause of his condition?

A. *We found no bacteriologic or viral, allergic, malignant, neoplasma origin for his ulcers.*" (R. 250-1.)

"Q. Now, you mentioned bacteria and virus. There are other things, too are there not, such as allergy, sensitivities, systemic disease, or conditions?

A. Yes, sir. We reviewed every one of those.

Q. You just didn't find the answer any place here, did you?

A. Not in terms of what you mentioned, no, sir.

Q. So you still don't know why his ulcers didn't heal up and you don't know why new ones developed, do you?

A. This is correct.

Q. And that is after two years of study out there at your hospital?

A. Yes, sir." (R. 252.)

"Q. And having made a *differential diagnosis*, you still have not been able to determine the * * * immediate, the producing cause of these ulcers?

A. The immediate producing cause, yes.

Q. And their failure to heal?

A. Yes." (R. 253.)

"Q. So you still after all these studies are not able to tell us the immediate cause of his condition?

A. Very true.

* * * * *

Q. *Until you find the specific and immediate cause you can't really rule out anything, can you?*

A. Not a single thing." (R. 256.)

13. The Hypothetical Question Asked of Petitioner's Doctors. A single identical hypothetical question was addressed to each of Doctors Ippolito and Anderson by petitioner's counsel, and to no other of his witnesses. (R. 189-94; 243-7.) In it they were asked to assume the truth of a lengthy series of hypotheses concerning the existence of the pool, the presence therein of dead pigeons, dead rats, and *wholly undescribed* insects, the occurrence of an insect bite in close proximity thereto, and the subsequent onset and course of petitioner's illness.

The question did *not* contain any assumption as to: the identity or communicability of petitioner's illness; the species or habits of the biting insect; whether such insect was present at or attracted by the pool or its contents prior to the bite; or where petitioner was when the insect first got upon his person. No such assumptions could be contained because no such facts were in evidence.

At the close of the question each doctor was asked whether he had an opinion based on reasonable medical

certainty as to whether there was "a direct or proximate causal relationship" between: (1) the ditch containing the stagnant water, dead rats, dead pigeons and insects flying around it; *and* (2) the bite or sting sustained by petitioner; *and* (3) his present physical condition. (R. 193-4, 247.) Over timely objection, both doctors responded that in their opinion there was a direct causal relationship between the property conditions under the bridge, *and* the bite; *and* petitioner's subsequent disease. (R. 194, 247.) Thus both doctors opined not only a causal relationship between the bite and petitioner's physical condition but also a pre-existing causal connection between the property conditions *and the bite itself*. In Section D of the Argument section hereof the legal insufficiency of this kind of hypothetical testimony will be pointed out.

14. Petitioner's Doctors Admitted Lack of Specialized Knowledge of Insect Life. Both Drs. Ippolito and Anderson admittedly reasoned, in answering the hypothetical question as they did, that the *biting* insect was attracted by the pool and its contents, and that therefore in their opinion there was a causal connection between the pool and the bite. (R. 222, 261.) Both doctors repeatedly testified that they had no specialized or expert knowledge of insects or their habits. (R. 197, 261, 263, 271, 272.) They also testified that they had *no* knowledge of *any* kind of insect which is one-half inch in diameter and two inches long (the size assumed in the hypothetical question), and that they had *no* knowledge of what the habits of such an insect would be. (R. 197, 222, 224, 270-1.)

15. The Testimony of the Only Expert Entomologist. The complete omissions in petitioner's case with respect to the types and habits of insects which might be attracted to respondent's property were not filled until respondent's case, when the only expert entomologist was called to

testify. Dr. Louis A. Stearns, a medical entomologist whose qualifications were not questioned and whose testimony on these points was entirely *uncontradicted* by petitioner, gave evidence as follows:

The only insects which are reasonably likely to attack human beings, and which would be attracted by the conditions under the bridge, are two varieties of mosquitoes, neither of which remotely approaches the size described by petitioner. (R. 362.) While there are insects as large as two inches long and one-half inch in diameter which are native to northern Ohio, none of them is likely to attack human beings. (R. 363.) The horsefly is the largest insect native to Ohio which is likely to attack human beings, but its maximum size is only about half that described by plaintiff; it would not be attracted to, or breed or feed in, an area like that beneath the bridge, and would not even be likely to alight in such an area if casually present. (R. 363-4.) Further, Dr. Stearns testified that it was highly unlikely that *any* insect could crawl up a man's leg inside his pants and bite him above the knee without having been on his body for at least five minutes. (R. 364-5.)

Dr. Stearns further testified that the *only* insects attracted by the dead animals beneath the bridge are scavenger insects—burying beetles or carrion beetles—but "*they don't sting and they don't bite anyone.*" (R. 380-1.)

Petitioner called witness James R. Skelly, a museum curator, in an effort to rebut some of Dr. Stearns' testimony covering giant water bugs, but he expressly disclaimed *any* qualifications as an entomologist, and he stated that such a bug would bite "only when * * * improperly handled" by a collector, and that he did not know their dietary habits. (R. 495, 502, 503.) Dr. Stearns had testified that giant water bugs do not ordinarily bite;

that one might bite only if taken in hand and squeezed; and that they are not attracted by human beings nor by the conditions on respondent's premises. (R. 368, 369, 381-2.)

Thus, the only record testimony from a qualified insect expert provided *uncontroverted* evidence (1) that there was no unreasonable risk of harm from insect bite presented by the condition of respondent's property; (2) that a causal connection between such property conditions and the presence of the biting insect was nonexistent; and (3) that no insect of the size described by plaintiff would have had prior contact with the stagnant pool or its contents.

16. The Special Verdict Rendered by the Jury. The testimony above summarized is all of the record evidence having any material bearing upon the issues of liability in this case. At the conclusion of all the evidence the Court submitted to the jury a form of special verdict of the Court's own composition. The text of the individual questions of the special verdict together with the answers thereto are set forth in full at R. 559-562. For present purposes it suffices to state that in its answers to the questions of the special verdict the jury purported to find the following: (1) That a pool of water existed under the Columbus Road Bridge on respondent's premises, and that dead pigeons, dead rats, vermin, and bugs accumulated under the bridge in the stagnant water (Questions 1-8); (2) that petitioner was bitten near or about the bridge in August, 1954, while in the performance of his duties (Questions 9-12); (3) that respondent knew that the pool under the bridge would attract dead animals and insects (Question 14); (4) that petitioner's illness or disease was caused in whole or in part by an insect bite (Question

18); (5) that respondent was negligent (Question 16) in that:

> "There existed a pool of stagnant water on premises in possession of and under control of defendant, into which was accumulated dead pigeons, rats, and various forms of bugs and vermin." (Question 17.)

In other answers, however, the jury made the following findings:

> "13. Did the defendant B & O provide the plaintiff, Mr. Gallick, a reasonably safe place to work under the facts and circumstances existing at the time? Answer: *Jury can't decide on this question.*
>
> * * * * *
>
> "20. If the answers to any of the questions numbered 1, 5, 6, 7 and 8 [inquiring whether the alleged unsanitary conditions existed on the Railroad's premises] is yes, was there *any* reason for the defendant B & O to *anticipate* that such would or might probably result in a mishap or an injury? Answer: *No.*
>
> "21. Is there a proximate causal relationship to [sic] the stagnant water, the dead rats, the dead pigeons, the insect bite, and the present physical condition of the plaintiff? Answer: Yes.
>
> "22. If the answer to Question 21 is yes, was it within the realm of reasonable probability or *foreseeability* of the defendant B & O to appreciate this proximate causal relationship between the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff? Answer: *No.*"

Notwithstanding the above-quoted answers, and in spite of the fact that the jury rendered no general verdict for petitioner, the Court denied respondent's motion for entry of judgment and entered judgment for petitioner in the amount of $625,000, the damages which the jury found petitioner to have sustained.

ARGUMENT.

SUMMARY.

It is the purpose of this brief to demonstrate that the final judgment entered for respondent by the Ohio Court of Appeals is correct and should not be disturbed by this Court. In so contending, however, respondent will not restrict itself to the single ground of decision set forth in the Court of Appeals' opinion, which in reality represents but one of the determinative issues of the case.

In its framing of the Questions Presented, *supra*, respondent has suggested *three* principal issues on which the decision of this Court is required. The first two Questions relate to the insufficiency of the evidence of railroad negligence, and of causation, respectively, to take the case to the jury. The Ohio Court of Appeals decided only the latter issue, and merely assumed *without deciding* that there "could" be sufficient evidence to establish a jury issue of negligence. (R. 626.) It is the position of respondent, however, that the proofs appearing in this record are insufficient to justify with reason either the conclusion that respondent was negligent or the conclusion that such negligence played any part in petitioner's illness.

In addition to and independent of the foregoing contentions, respondent submits in answer to its Question 3 that the special verdict of the jury, in which it was specifically found *as a fact* that there was "no reason for the defendant B & O to anticipate that [respondent's property conditions] * * * would or might probably result in a mishap or an injury," requires entry of final judgment for respondent: (R. 561—Question No. 20.)

Finally, and in the event that this Court fails to agree with respondent's contentions on any of the foregoing questions, respondent would then be entitled to have the

case remanded to the Supreme Court of Ohio for further consideration of procedural, evidentiary, and damage questions not heretofore examined by it.

The precise reasons why this judgment should be affirmed are as follows:

1. Respondent is free to urge affirmance, and this Court is free to affirm, upon any ground which supports the judgment below. (Section A of Argument, *infra*.)

2. There was no showing that employer property was known to contain insects of a species *likely* to injure or transmit disease to humans in northern Ohio. Likewise, there was no proof that employer premises contained any communicable disease known to northern Ohio. Therefore, there was no proof of foreseeability of harm, and consequently no proof of employer negligence. And this is true even if it be assumed, *arguendo*, that the biting insect did come from employer premises. (Section B of Argument, *infra*.)

3. It is admittedly *not known* that petitioner suffers from a communicable or infectious disease at all. It therefore cannot be concluded with reason that his illness came from anyone's premises, or that it was transmitted by an insect. Moreover, there was no credible showing that the biting insect, whose species is admittedly unknown, came from employer premises. Therefore, there was no proof of *any* kind of causal connection between respondent's premises and petitioner's illness. (Section C of Argument, *infra*.)

4. If the conclusions of petitioner's doctors in their answers to the hypothetical question were logically sound or scientifically valid, *competent* testimony of *qualified* experts could and should have been introduced to furnish the factual support which was legally indispensable

to such conclusions. In the absence thereof, there is no record evidence whatsoever of negligence, foreseeability, or causation. (Section D of Argument, *infra.*)

5. The jurors' verdict, with their direct finding of no foreseeability of "any mishap or injury," and with their refusal to find that the employer premises were unsafe, is not legally sufficient to support a judgment for petitioner and supports the final judgment for respondent. (Section E of Argument, *infra.*)

A. THE ISSUES PRESENTED ARE NOT LIMITED TO THOSE CONSIDERED BY THE COURT BELOW.

Although petitioner's brief purports to frame nine questions (PB 5-7) for review, analysis discloses that each is nothing more than an argumentative variation of a single issue: whether there was sufficient evidence that respondent's assumed negligence was a cause of petitioner's illness to take the case to the jury, which was the only question discussed in detail by the Ohio Court of Appeals. Indeed, at page 9 of the brief, petitioner affirmatively asserts that causation is "the *single* issue presented," and the balance of the brief deals with that question alone.

Petitioner thus seeks to restrict this Court, in its consideration of the correctness of the result below, to an examination of the single ground of decision adopted by the Court of Appeals and apparently would have this court overturn that result and enter final judgment for petitioner if such ground of decision, or the reasoning process of the court, or even the bare choice of words used by the court, are in any respect incorrect.

It is clear that petitioner's effort to so restrict this Court must fail. It has been the undeviating rule of this Court that respondent is free to urge affirmance, and this Court is free to affirm, upon any ground which supports

the judgment below, even though such ground may not have been considered by the lower court. *Langnes v. Green*, 282 U. S. 531, 537-9, 51 S. Ct. 243; *Helvering v. Gowran*, 302 U. S. 238, 245, 58 S. Ct. 154; *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U. S. 276, 283-4, 81 S. Ct. 1316. Thus, the issue of causation is only one of several grounds which independently support the judgment below, all of which will be argued in this brief.

B. THERE IS NO PROOF OF RAILROAD NEGLIGENCE BECAUSE THERE WAS NO PROOF THAT ITS PROPERTY CONTAINED OR WOULD ATTRACT INSECTS (OR MICRO-ORGANISMS) OF A SPECIES LIKELY TO CAUSE INJURY OR DISEASE IN NORTHERN OHIO.

1. Lack of Proof of Any Such Insects (or Micro-organisms) on Employer Premises.

Petitioner's basic theory of negligence is that the respondent "knew" that the alleged unsanitary conditions on its premises would attract insects dangerous to humans, and that petitioner was bitten and diseased by one of the insects so attracted. (R. 3—the Amended Petition.)

In petitioner's brief in the Court of Appeals, the following succinct admission was made by his counsel:

> "* * * there is not one shred of evidence by either plaintiff or defendant which would possibly enable the jury" to identify the alleged biting insect. (Page 74 of that brief).

No witness identified any species of insect other than "ants, sand fleas*, Canadian Soldiers, mosquitoes and flies," as having been observed at or near said pool at any time. (R. 156-7, 316-8.)

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*"Sand fleas" were described as small, fuzzy insects blown in off Lake Erie in June. (R. 317-8.) The same is true of Canadian Soldiers.

There was no showing that *any* insects previously seen on respondent's premises, or likely to be attracted by the conditions thereon, were of a species that is known to cause injury or disease in northern Ohio. (R. 156-7, 263, 316.)

The mere presence of other *unidentified* insects does not imply danger, for it is common experience that most of the many species of insects do not attack man.

No witness, including the petitioner and his co-employees who had worked for years in this area, testified to ever having suffered an injurious bite in the area of this pool, or to knowing of anyone who had. (R. 24-5, 318.)

If petitioner should attempt to broaden his argument by claiming that it was the unsanitary conditions *per se* that allegedly made the premises unsafe and imposed liability in this case, suffice to say also that there was *not a word of evidence*: (1) that respondent's premises in fact contained *any* known communicable disease; (2) that dead pigeons, dead rats, at stagnant water contain *any* known communicable diseases common to northern Ohio; or (3) that the long-existing conditions on respondent's property had at any time caused harm of *any* kind to anyone. (R. 24-5, 219, 263-4, 318.)

From the foregoing it is clear that there was no evidence presented from which it can be inferred with reason that respondent, in the exercise of reasonable care, should have foreseen a likelihood of injury to its employees from the condition of its premises. Therefore, there is no legally sufficient proof of negligence in this record.

In the case of *Inman v. Baltimore & Ohio Railroad Co.*, 361 U. S. 138, 80 S. Ct. 242 (1959), the railroad was charged with negligence in maintaining a public street crossing which was in such condition that it exposed its crossing watchman to negligent, and therefore dangerous, motorists using the crossing. In affirming a denial

of recovery as a matter of law this Court held that direct testimony that on prior occasions motorists had been seen "jumping the gun," thereby inferentially endangering the watchman, was "too slender a reed" to provide evidence that injury from the crossing was "reasonably foreseeable" and the railroad negligent. In substance this Court held that without evidence that the crossing was *known* to be used by motorists of a kind *likely to cause injury*, the proof was not sufficient to present a jury issue of negligence.

The same basic rule of law has even been applied in cases involving injury to a railroad employee by a dangerous co-employee and occurring on railroad property. *Atlantic Coast Line R. Co. v. Southwell*, 275 U. S. 64, 48 S. Ct. 25 (1927); *St. Louis-San Francisco R. Co. v. Mills*, 271 U. S. 344, 46 S. Ct. 520 (1926). Recent cases in accord on similar facts are: *Moreno v. New York Central R. Co.*, unreported below, cert. den. 366 U. S. 928 (1961); *Young v. New York Central R. Co.*, 88 Ohio App. 352, 88 N. E. 2d 220, cert. den. 339 U. S. 986 (1949).

In the cases cited the railroad certainly was responsible for the vicious employee being on its premises, and it certainly knew of his presence. But without *further* evidence that such employee was *known* to be of a kind *likely to cause injury*, there was no proof of reasonable foreseeability of injury and no negligence as a matter of law.

So, in the case at bar, although the respondent knew that there were "bugs and insects" (and perhaps unidentified micro-organisms) on its premises, there is no negligence merely by their presence, in the absence of a *further* showing that some of them were known to be of a species *likely to cause injury*. There was no such proof offered here, and therefore there is no proof of negligence. And this would be true even if it be assumed *arguendo*

that the biting insect did in fact come from the employer premises, just as the vicious co-employees did in the cases cited.

2. The Legal Requirement of Foreseeability of Harm.

In the historical development of the law of negligence, it has been held from the very beginning that in order to hold a defendant liable for negligence, there must be proof that the conduct claimed to be negligent involves a known, and therefore a foreseeable, risk of harm to others. 8 *Holdsworth, A History of English Law*, 450 (2d Ed. 1937). The indispensability of a foreseeable risk of harm has been underscored time and time again in landmark American cases whose names are household words to every lawyer. *Parrot v. Wells, Fargo & Co.* (*"The Nitro-glycerine Case"*), 15 Wall. 524, 536-7; *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (Cardozo, J.); *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 389, 111 N. E. 1050, 1053. Even the most liberal of present-day commentators on the law of torts are in accord:

> "Knowledge is fundamental to liability for negligence. The very concept of negligence presupposes that the actor either does foresee an unreasonable risk of injury, or could foresee it if he conducted himself as a reasonably prudent man." *Harper and James, The Law of Torts*, § 16.5, p. 907 (1956).

Foreseeability is no less a requirement under the recent decisions of this Court. It applies to actions against the United States under the Federal Tort Claims Act, *Dalehite v. U. S.*, 346 U. S. 15, 42, 73 S. Ct. 956. It has been reiterated in varying contexts as the proper test of liability under the Federal Employers Liability Act. In *Ringhiser v. Chesapeake & Ohio R. Co.*, 354 U. S. 901,

903, 905, 77 S. Ct. 1093, both the majority and dissenting members of this Court agreed that the burden rests upon a plaintiff to show that injury to an employee is "a reasonably foreseeable consequence of any act or omission of the railroad" before a jury case exists. To the same effect are *Lillie v. Thompson*, 332 U. S. 459, 461-2, 68 S. Ct. 140; *Brady v. Southern R. Co.*, 320 U. S. 476, 483, 64 S. Ct. 232; *Inman v. Baltimore and Ohio R. Co., supra*, (361 U. S. 138, 140, 145-6); *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 503. Lack of foreseeability has even been held to shield a vessel owner from the absolute liability of the doctrine of unseaworthiness. *Morales v. City of Galveston*, 370 U. S. 165, 171, 82 S. Ct. 1226. Petitioner has never cited, and cannot now cite, any authority which dispenses with foreseeability as a predicate to liability for negligence. No such authority exists.

The legal insufficiency of the evidence here to take to the jury the question of respondent's negligence is further emphasized by the jury's own conclusion (discussed at Section E hereof, *infra*) that respondent had no reason to anticipate that its property conditions "would or might probably result in a mishap or an injury." (R. 561.)

C. THERE IS NO PROOF OF ANY CAUSAL CONNECTION BETWEEN RESPONDENT'S PREMISES AND PETITIONER'S ILLNESS.

1. No Proof of Species of Insect Involved, and Therefore No Proof of Its Source.

There is no credible evidence in the record from which it may be inferred with reason that the biting insect came from, or was attracted by, the condition of respondent's premises. The biting insect was never observed either before or after the bite. The Court of Appeals, after reading the entire record, referred to the "biting" insect

as being wholly "undescribed (except as to size and biting qualities)." (R. 627.) Moreover, no attempt was made to identify the species of insects of similar size reportedly seen by plaintiff on the "dead hides" at times prior to the day in question. There was no showing that any such insects were of a species either *likely* to bite man, *or even physically equipped to bite.*

The only qualified specialist called to testify (Dr. Stearns—the medical entomologist) testified *uncontradictedly* that "the only kind of insects attracted by dead bodies * * * *don't sting and they don't bite anyone*" (R. 380-1), and that of all insects known to attack humans only mosquitoes would be attracted by the standing water or other conditions present. (R. 362-3, 373.) No claim is made, of course, that petitioner was bitten by a mosquito.

Although petitioner's medical witnesses admittedly reasoned, in order to answer the hypothetical question, that the object felt by petitioner within his pants leg more probably came from the pool than from other sources, yet they not only *admitted* that they had no specialized knowledge whatever of insects or their habits, but also that they possessed absolutely *no* knowledge of the likely species, habits, or origins of an insect *of the size described by petitioner as the biting insect.* (R. 197, 222-4, 261, 263, 270-1). These admissions of ignorance and lack of qualifications destroyed any evidentiary value of their testimony in establishing a causal connection between the pool and the insect which supposedly bit petitioner. (See the cases cited in Section D-1 hereof.)

2. No Proof of the Medical Cause of Petitioner's Illness, and Therefore No Proof That His Illness Is Transmittable by an Insect.

There is no evidence in this record that petitioner is known to suffer from a communicable or infectious disease at all. No "infectious cause of his various ulcers" has ever been found. (R. 266.)

Petitioner's attending doctors admittedly do not know "the immediate producing cause" or "the specific cause" of his illness. They do not even know whether the cause of his condition is "bacteriologic, viral, allergic, malignant or neoplasm" in origin. (R. 251-3; 182, 216, 219.)

After full *differential* diagnosis it has not been determined whether the cause of his ulcers is an infectious or a non-infectious (systemic) disease. (R. 252-3, 266.) And as Dr. Anderson testified: *Until the specific and immediate cause of the ulcers is found a doctor cannot rule out "a single thing" as being the cause.* (R. 256.) Petitioner presented no other doctors on the subject.

The matter of the cause of the ulcers is a medical subject, not a lay subject. The jury therefore could not go beyond the doctors' admitted ignorance on the subject.

It is admittedly not known that petitioner suffers from a kind of disease that is, or even can be, transmitted by an insect. (R. 263.) Yet at page 29 of his brief it appears that petitioner's basic claim is that the insect was "a transmittal agency" of his disease.

There is therefore no proof that the illness involved came from respondent's premises, or from any premises for that matter. In short *there is no showing that petitioner suffers from a disease that is transmittable by any agency, let alone an insect.*

D. THE LEGAL INSUFFICIENCY OF THE DOCTORS' TESTIMONY TO PROVIDE ANY SUBSTANTIVE EVIDENCE OF NEGLIGENCE OR CAUSATION.

1. The Legally Invalid Answers to the Hypothetical Question.

A summary of petitioner's medical evidence will be found at Sections 12, 13 and 14 of the Statement herein, *supra*. As is there indicated, petitioner's sole proof of negligence and causation is to be found, if at all, in the hypothetical question addressed to petitioner's doctors and their answers to it.

Respondent freely concedes in this connection that both Doctors Ippolito and Anderson would be fully qualified by reason of their medical training to testify on the basis of the hypothetical question that there was a proximate causal relationship between the insect bite and plaintiff's illness, *provided* they were able to state (which they were not) the medical cause of his illness. But when the doctors in a single answer purported to reach not only a conclusion on the medical subject but in addition to state that there was a direct causal connection between the stagnant pool and the presence of this particular biting insect upon petitioner's body, they ventured from their field of knowledge into a realm in which they themselves repeatedly admitted *having no specialized knowledge*.

On cross-examination of the doctors, questions were addressed to them which sought to establish the manner in which they arrived at their conclusion that the biting insect had come from the pool prior to getting on petitioner's person. Dr. Ippolito's response was limited to the following brief sentence:

> "We do know that stagnant pools of water, particularly that are infected and have rodents, rats in them, that insects will go to that area more so than in a dry, clean area." (R. 222.)

But when pressed for his knowledge as to "*what types*" of insects such conditions would attract, the doctor, after mentioning mosquitoes and flies, stated that such conditions would attract "Any type of a bug—Just any type at all." (R. 223.) Of course such testimony is manifestly absurd and fallacious on its face,* and yet it is solely upon such evidence that petitioner would have this Court take over $625,000.00 away from respondent and award it to him.

Dr. Anderson's reasoning was on a similarly generalized and fallacious basis. (R. 261.) He also testified as follows:

> "Q. So that there are certain *recognized* diseases which can be traced to particular insects?
>
> A. There are a certain number, yes.
>
> Q. You haven't found any such disease in the case of Mr. Gallick, have you?
>
> A. No, sir." (R. 263.)

Thus the doctors admittedly have no knowledge that petitioner suffers from an insect-borne disease at all.

Both Doctors Ippolito and Anderson repeatedly conceded that they had no specialized knowledge in the field of entomology, which is the study of insects and their habits. (R. 197, 261, 263, 271, 272.) Indeed, their ignorance of the field was such that neither could suggest *any kind* of insect which is a half inch in diameter and two inches long, the size assumed in the hypothetical question, and both disclaimed *any knowledge of what the habits or living conditions of such an insect would be.* (R. 197, 222, 224, 270-1.) Thus they could have no valid opinion of its probable source.

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* "A vast number of insects only exist in association with vegetation." (12 *Encyclopaedia Britannica*, 419 (1941).)

It is axiomatic that an expert cannot go outside his specialty, even in part, in rendering an opinion, and that when he does, his opinion is not regarded as substantial evidence. And even when he stays within his field his opinion is likewise without weight if it is based in some part upon admitted ignorance or is otherwise purely speculative or opposed to the dictates of common sense. The general rule of law applicable here is concisely stated in the case of *United States v. Thornburgh*, 8th Cir., 111 F. 2d 278, 280, cert. den. 311 U. S. 664 (1940), which involved medical opinion testimony:

> "A reviewing court, however, is not always required to accept as substantial evidence the opinions of experts. 'Where it clearly appears that an expert's opinion is opposed to physical facts or to common knowledge or to the dictates of common sense or is pure speculation, such an opinion will not be regarded as substantial evidence.' Svenson v. Mutual Life Ins. Co. of New York, 8 Cir., 87 F. 2d 441, 445. See also United States v. Hill, 8 Cir., 62 F. 2d 1022, 1025; United States v. Doublehead, 10 Cir., 70 F. 2d 91, 92."

To the same effect are: *Rhodes v. United States*, 4th Cir., 282 F. 2d 59, 62, cert. den. 364 U. S. 912 (1961); *Washington v. United States*, 9th Cir., 214 F. 2d 33, 43, cert. den. 348 U. S. 862; *Kauk v. Anderson*, 8th Cir., 137 F. 2d 331, 334 (1943); *Ensign-Bickford Co. v. Reeves*, 8th Cir., 95 F. 2d 190, 195 (1938); *Atlantic Life Ins. Co. v. Vaughan*, 6th Cir., 71 F. 2d 394, 395-6, cert. den. 293 U. S. 589.

Nor was the jury in any better position than the doctors to infer foreseeability or a causal connection between the property conditions and the biting insect. There was no showing that the object felt by petitioner was a species of insect whose habits, origins, and biting abilities or propensities are of common knowledge. Again, the only

qualified expert on insects (Dr. Stearns) stated directly that the property conditions complained of would *not* attract any insect of the size described by petitioner, nor a biting insect of any size other than common mosquitoes.

2. There Was No Competent Factual Proof to Support the Doctors' Reasoning Process.

Stripped to its bare essentials, the doctors' reasoning process—petitioner's *sole* proof of foreseeability, negligence, and causation—may be reduced to the following simple syllogism: *Major premise*: Property conditions like those on respondent's premises are known to attract *some* species of insects and harbor *some* types of disease, none of which is known to be involved in petitioner's case or has ever been found on respondent's property. *Minor premise*: Petitioner was bitten by an unidentified insect near such property conditions, and he suffers from an illness of unknown cause. *Conclusion*: Therefore, the unidentified insect transmitted the unknown disease from the pool to petitioner, and it was reasonably foreseeable that it would do so.*

If this represents a logically sound and scientifically defensible reasoning process (as petitioner must neces-

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* The legal unvalidity and lack of weight of such testimony is well stated in the case of *United States v. Hill*, 62 F. 2d 1022, 1025-6, which involved medical opinion testimony:

> "* * * 'So that obvious error of opinion, opinion based on insufficient data, or nonsense clothed in words of "learned length," may be disregarded by this Court as a basis for supporting a verdict.'
>
> * * * * *
>
> "Necessarily, the weight of the opinion of an expert depends largely upon the facts upon which it is based. * * * If not justified by the evidence or by reason, it is entitled to no weight. * * * It is safe to say that an opinion rises no higher than the level of the evidence and the logic upon which it is predicated."

sarily claim), why was no *competent* proof introduced to support it? Why did petitioner call no qualified entomologist to testify that there are types of insects of the size described by petitioner which are indigenous to northern Ohio and which characteristically attack, bite, or sting human beings; that such insects feed on decayed animal matter and/or thrive on stagnant water, preferring that environment to the weeds and vegetation found everywhere in summer, including the Cleveland Flats? Why was there no testimony which would permit the jury logically to infer that the existence and habits of such insects are so commonly known as to place respondent upon notice that its property conditions would expose its employees to an unreasonable risk of harm therefrom? And assuming it could be proved that such risk *was* notorious, why did not petitioner also attempt to establish that the elimination of this *single stagnant pool* would have appreciably reduced the numbers of such insects and the likelihood of insect bite to its employees? The answer to these questions—totally ignored by petitioner in any brief to date—is as simple as it is obvious: no *qualified* expert entomologist could honestly give testimony on these subjects which would have been favorable to petitioner's case. On the contrary, the only *competent* entomological testimony, that of Dr. Stearns, flatly contradicted the premises and reasoning process of Doctors Ippolito and Anderson and showed that their supposed conclusions were based on half-truths, supposition and ignorance, rather than on scientific knowledge, logic and fact. (See Section 15 of the Statement, *supra*.)

From the foregoing, it is clear that there was no evidence presented from which it can be inferred with reason that respondent, in the exercise of reasonable care, should have foreseen injury to its employees from the condition of

its premises, nor that petitioner's illness did in fact come from respondent's premises or from any other outside source. Therefore, there is no legally sufficient proof of negligence and causation in this record.

E. THE JURY VERDICT IS LEGALLY INSUFFICIENT TO SUPPORT A JUDGMENT FOR PETITIONER, AND SUPPORTS THE JUDGMENT FOR RESPONDENT.

There was no general verdict.* The jury's verdict consisted of its findings in response to 23 questions composed and submitted by the trial court.

In answer to Questions 1, 5, 6, 7 and 8, the jury found that a pool of stagnant water existed on B. & O. premises, in which dead pigeons, dead rats, vermin and bugs accumulated. Having made these findings the jury then further found:

> "20. If the answers to any one of the questions numbered 1, 5, 6, 7 and 8 is yes, was there any reason for the defendant B. & O., to anticipate that such would or might probably result in a mishap or an injury?
>
> A. No." (R. 561.)

The resolution of this issue was also confirmed by the negative finding in answer to Question 22, which again inquired about foreseeability of injury. (R. 561.)

In response to Question 13, the jury was unable to agree that the workplace was unsafe, as follows:

> "13. Did the defendant B. & O., provide the plaintiff, Mr. Gallick, a reasonably safe place to work under the facts and circumstances existing at the time?
>
> A. Jury can't decide on this question." (R. 560.)

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* For this reason the cases cited by petitioner relating to the principle that answers to interrogatories should, if possible, be interpreted in a way consistent with the *general* verdict, do not apply.

Thus the jury found directly that there was no reason for respondent to foresee "a mishap or injury" from the stagnant pool with its accumulated dead pigeons, dead rats, vermin and bugs.* Further, the jury could not agree, and in effect stated that petitioner had not proved to their satisfaction, that respondent had failed to provide petitioner with a reasonably safe place to work, which by any fair analysis of the pleadings and evidence was the only substantive neglect alleged and submitted.

Even in seaworthiness cases where the employer is held to an insurer's duty to provide a safe ship, it has been determined by this Court that the mere happening of an accident and injury on board is not sufficient to impose liability, and that where the trier of the facts determines that "what happened was an unexpected, isolated occurrence" due to the "unforeseeable introduction of a noxious agent from without," there is no liability. *Morales v. City of Galveston, supra* (370 U. S. 165, 169, 171, 82 S. Ct. 1226).

In cases such as the case at bar, where the employer is not an insurer but is liable only for negligence, it has always been held that a jury determination that there was no reason to anticipate or foresee any mishap or injury negates negligence and legal liability as a matter of law. *Inman v. Baltimore & Ohio R. Co., supra* (361 U. S. 138, 140); *Ringhiser v. Chesapeake & O. R. Co., supra* (354 U. S. 901, 903, 905); *Rogers v. Missouri Pacific R. Co., supra* (352 U. S. 500, 503); *Dalehite v. U. S., supra* (346 U. S. 15, 42); *Brady v. Southern Ry. Co., supra* (320 U. S.

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* Section 2315.17 of the Revised Code of Ohio, as does Rule 49(b) of the Federal Rules of Civil Procedure, provides that a special finding of the jury shall control its verdict, as follows:

> "When a special finding * * * is inconsistent with the verdict, the former shall control the latter, and the court may give judgment accordingly."

476, 483); *Green v. American Tobacco Co.*, 5th Cir., 304 F. 2d 70, 76-7; *Republic of France v. U. S.*, 5th Cir., 290 F. 2d 395, 399-401, cert. den. 369 U. S. 804 (1962); *Siegrist v. Delaware, etc. R. Co.*, 2d Cir., 263 F. 2d 616, 618-9, cert. den. 360 U. S. 917; *Merrill v. Beaute Vues Co.*, 235 F. 2d 893, 896; *Prosser on Torts*, 2d Ed. pp. 119-121, 274-6, 323-4 (animals and insects); 2 *Harper & James, Torts*, pp. 929-30, 1134.

F. IN THE EVENT THIS COURT HOLDS THAT PETITIONER IS OTHERWISE ENTITLED TO FINAL JUDGMENT, THE CASE SHOULD NONETHELESS BE REMANDED TO THE OHIO SUPREME COURT FOR CONSIDERATION OF QUESTIONS OF OHIO LAW NOT HERETOFORE EXAMINED BY IT.

In its appeal to the Ohio Court of Appeals, respondent set forth a number of specifications of error (R. 620-2), involving, among others, errors with respect to the admission of evidence, interpretation of Ohio procedural statutes, and the excessiveness of the verdict. All of such specifications were dealt with in the following brief sentence of that Court's opinion:

> "All other claimed errors have been examined and we find none prejudicial to the rights of the appellant." (R. 628.)

The same errors committed by the trial court were subsequently made the subject of a cross-motion to certify filed by respondent in the Supreme Court of Ohio. (R. 636.) When respondent's cross-motion to certify was overruled by that Court (R. 639), respondent filed an application for a re-hearing thereof (R. 640-1), which was likewise denied. No reasons for rejection of the cross-motion were given in either instance.

Thus, if this Court should determine that petitioner's proofs and the verdict of the jury are sufficient to support

the trial court's $625,000 judgment, then unless this Court remands the cause to the Ohio Supreme Court, respondent will be confronted with final judgment without any authoritative decision of the court of last resort of Ohio on the numerous questions of Ohio law which that Court has heretofore declined to consider, and upon which this Court is powerless to rule.*

It should be emphasized, in this connection, that the Ohio Supreme Court's refusal to admit the case on respondent's cross-motion to certify does *not* imply that that Court has examined and rejected the errors therein asserted by respondent, for that Court has repeatedly ruled that its denials of motions to certify (which invoke only a discretionary review) by no means indicate agreement with or affirmance of the judgment below. *Swetland Co. v. Evatt*, 139 Ohio St. 6, 18, 37 N. E. 2d 601, 606-7; *Keesecker v. G. M. McKelvy Co.*, 141 Ohio St. 162, 169, 47 N. E. 2d 211, 215; 4 *Ohio Jurisprudence* 2d, Appellate Review, § 1198, p. 559.

It is thus entirely possible that the Ohio Supreme Court's denial of the cross-motion to certify was occasioned by that Court's view that the errors claimed by respondent, though otherwise prejudicial, were academic in the light of the final judgment for respondent entered below. Where such is the case, this Court has frequently remanded to the court below for proceedings not inconsistent with its opinion. *Indiana ex rel. Anderson v. Brand*, 303 U. S. 95, 109; *Dean Milk Co. v. Madison*, 340 U. S. 349, 356-7; *Nostrand v. Little*, 362 U. S. 474, 475-6. The

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* *Seaboard Airline Railway v. Padgett*, 236 U. S. 668, 671; *Seaboard Airline Railway v. Duvall*, 225 U. S. 477, 485-8; *Central Vermont Ry. Co. v. White*, 238 U. S. 507, 509, 515-16; *Rogers v.* Thompson (Mo. Sup. Ct.), 308 S. W. 2d 688, 690-1; *United States ex rel. Pascal v. Burke*, 90 F. Supp. 868, 871; and see *Phillips Co. v. Dumas School District*, 361 U. S. 376, 386.

same practice has been followed in actions arising under the Federal Employers' Liability Act. *Stinson v. Atlantic Coast Line Railroad*, 355 U. S. 62.

G. CONCLUSION.

If respondent's contentions are well taken with respect to any *one* of the three fundamental questions presented for review, the facts and law discussed above plainly require this Court to affirm. But it matters little which of the three is regarded as controlling, for when this record is read as a whole, the simple justice of the present result emerges inescapably. Not only was no evidence produced by petitioner to show that the conditions on respondent's property gave rise to a foreseeable risk of harm to employees, or in fact caused harm to petitioner, but the jury itself confirmed petitioner's failure of proof in finding that there was no reason for respondent to anticipate *any* "mishap or injury" therefrom. No court can now supply the omission.

Respondent fully appreciates the extent to which this Court's decisions, cited by petitioner, have relaxed common law requirements of proof in F. E. L. A. actions. But each and every one of those decisions is distinguishable from the present case in two vital respects. First, in none of them was it specifically found by the jury (the final arbiter, as this Court has so often held, on disputed issues of fact) that the indispensable element of forseeability was lacking. Second, and equally important, in each of those cases there is every reason to suppose that *all* evidence reasonably available to the parties and relevant to the disputed issues was before the court. Thus, although "a measure of speculation" may have been involved in determining causation, the jury was at least in a position to make the most "educated" possible guess from among the

conflicting inferences. But here, by way of contrast, petitioner's case remains mysteriously and suggestively silent with respect to essential facts which, if favorable to his interest, were readily susceptible of competent and persuasive proof. There can be only one explanation of petitioner's omission: The bedrock scientific facts were directly contrary to those which petitioner had to prove in order to prevail.

Respondent is unwilling to believe that this Court's prior decisions require judgment for petitioner on a record as incomplete as this. To so hold would be to enshrine ignorance, half-truth and concealment at the expense of scientific knowledge, logic and fact.

Respectfully submitted,

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